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IN THE
COURT OF APPEALS OF INDIANA

PIKE COUNTY COMMISSIONERS, G. TODD MEADORS and PIKE COUNTY SHERIFF'S DEPARTMENT,	)	
Appellants-Defendants,	)	
vs.	)	No. 63A01-0609-CV-409
JASON P. TRAYLOR,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PIKE CIRCUIT COURT
The Honorable Jeffrey L. Biesterveld, Judge
Cause No. 63C01-0408-CT-204

June 1, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

G. Todd Meadors and the Pike County Sheriff's Department (hereinafter collectively "Pike County") appeal the trial court's denial of their motion for summary judgment regarding a complaint filed by Jason P. Traylor.[1] Pike County raises two issues, which we revise and restate as:

I. Whether Traylor failed to meet the 180-day deadline for giving notice under the Indiana Tort Claims Act ("ITCA") Ind. Code §§ 34-13-3-1 to 25; and

II. Whether Traylor's own contributory negligence bars his claim as a matter of law.

We find that Issue I is dispositive of this case and, therefore, we will not address Issue II. We reverse and remand.

The relevant facts follow. On or about October 29, 2003, Traylor was incarcerated in the Pike County Jail. At approximately 8:18 p.m. on that evening, Traylor was involved in a fight with two other inmates, was knocked unconscious, and suffered a cut on his lip. An investigation of the events also revealed that several inmates, including Traylor, had been consuming homemade alcohol prior to the fight.

Jail officers called the Jail Commander and the Pike County Emergency Medical Services, both of which arrived shortly thereafter. Traylor refused medical treatment and signed a release acknowledging his refusal. Traylor repeatedly insisted that he was fine and requested to be returned to his cellblock.

[1] Initially, the Pike County Commissioners were defendants in Traylor's case below. However, the trial court found the Commissioners were not proper parties to the action and dismissed them from the case.

Sometime later, inmates reported to jail personnel that Traylor was not eating and was sleeping too much. The Jail Commander checked on Traylor, and Traylor said that he was alright and did not need to see a doctor. Following repeated inmate reports that Traylor was not acting right, the Jail Commander went to see Traylor and told him that he needed to see the prison physician. Traylor said that he did not need to see a doctor.

On October 31, 2003, Traylor again insisted that he did not need to see a doctor. Despite Traylor's protests, the Jail Commander ordered an examination by the prison physician, who determined that Traylor was healing and that there was no evidence of neurological trauma, and gave Traylor Tylenol for pain.

Later that evening, Traylor "fell off of the medical bench he was sitting on" and "began to seize." Appellant's Appendix at 42. An ambulance was called, and Traylor was taken to Daviess Community Hospital and then to St. Mary's Hospital. In the early morning hours of November 1, 2003, a CT Scan revealed that Traylor suffered from an intracranial contusion. After receiving medical treatment, Traylor was released back to the Pike County Jail[2] on November 6, 2003.

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[2] In his Statement of Facts, Traylor states that he was "immediately transported to the [Indiana Department of Correction's] Reception and Diagnostic Center in Plainfield, Indiana, where visitation is limited to legal representatives and clergy, and arranged only on a case by case basis." Appellee's Brief at 3. The record does not show that these statements are based on facts that were designated as evidence, and therefore, we may not consider them in this appeal. See, e.g., American Mgmt. Inc. v. MIF Realty, L.P., 666 N.E.2d 424, 428 (Ind. Ct. App. 1996) (holding that upon review of a summary judgment, "[w]e may consider only those portions of the pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters designated to the trial court by the moving party for purposes of the motion for summary judgment" (internal citations omitted)).

Also, Traylor references materials that were filed after briefing for Pike's motion for summary judgment had concluded. Pike County filed motions to strike this evidence, but the record does not reflect that the trial court ruled on the motions. However, "it is presumed that the trial court disregarded

On April 29, 2004, Traylor mailed his tort claims notice to Pike County.[3] Traylor filed a complaint under the ITCA against Pike County on August 25, 2004, alleging that he was injured as a result of Pike County's negligent supervision. Pike County filed an answer and affirmative defenses, which included an allegation that Traylor's claims were barred by his failure to provide timely notice pursuant to the ITCA. Pike County filed a motion for summary judgment and argued, in part, that Pike County "provided reasonable and adequate supervision, provided appropriate medical assistance, and did not breach their duty to [Traylor]" and that Traylor's claim was barred because he failed to file a timely notice of claim. Id. at 146-72. The trial court denied Pike County's motion for summary judgment and certified it for interlocutory appeal.

Our standard of review for a trial court's grant of a motion for summary judgment is well settled. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(c); Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Id. Our review of a summary judgment motion is limited to those materials designated to the trial court. Id. We must carefully review a decision on

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all inadmissible evidence and weighed only the proper evidence in determining whether the plaintiff has carried [its] burden of proof." Mann v. Russell's Trailer Repair, Inc., 787 N.E.2d 922, 929 (Ind. Ct. App. 2003), reh'g denied, trans. denied. We need not address this issue because, even if we consider the evidence subject to the motion to strike, the outcome of this appeal does not change.

[3] A copy of the tort claim notice was not included in the record. However, Pike County states in its brief that the notice was filed on April 29, 2004, and Traylor, in his brief, appears to concede such.

summary judgment to ensure that a party was not improperly denied its day in court. Id. at 974.

The dispositive issue in this case is whether Traylor failed to meet the 180-day filing deadline for giving notice under the ITCA. The notice requirement under the ITCA is governed by Ind. Code § 34-13-3-8 (2004), which provides that "a claim against a political subdivision is barred unless notice is filed with the governing body of that political subdivision . . . within one hundred eighty (180) days after the loss occurs." Ind. Code § 34-6-2-75 (2004) defines a loss, for purposes of Ind. Code § 34-13-3, as "injury to or death of a person or damage to property." "The purpose of notice is to provide an opportunity for the State to investigate, determine liability and prepare a defense for the tort claim." Orem v. Ivy Tech State College, 711 N.E.2d 864, 869 (Ind. Ct. App. 1999) (citing Burggrabe v. Bd. of Pub. Works, 469 N.E.2d 1233, 1235-36 (Ind. Ct. App. 1984), reh'g denied, trans. denied), reh'g denied, trans. denied. This court has stated:

> Compliance with the notice provisions of the ITCA is a procedural precedent which the plaintiff must prove and which the trial court must determine before trial. Indiana Dep't of Highways v. Hughes, 575 N.E.2d 676, 678 (Ind. Ct. App. 1991), trans. denied. Indeed, when a plaintiff fails to give the required notice, the defendant has an affirmative defense which must be raised in a responsive pleading to the plaintiff's complaint. Thompson v. City of Aurora, 263 Ind. 187, 194-195, 315 N.E.2d 839, 843 (1975). Once the defendant raises failure to comply with the ITCA's notice requirements as an affirmative defense, the burden shifts to the plaintiff to prove compliance. Id.

Davidson v. Perron, 716 N.E.2d 29, 34 (Ind. Ct. App. 1999), trans. denied. "Because the notice provisions of the Tort Claims Act are in derogation of the common law, they must be construed against limitations on a claimant's access to the courts." Garnelis v. Ind.

State Dept. of Health, 806 N.E.2d 365, 368 (Ind. Ct. App. 2004) (citing Polick v. Ind. Dept. of Hwys, 668 N.E.2d 682, 685 (Ind. 1996)).

Pike County argues that it proved Traylor's tort claims notice was untimely because it was sent 183 days after Traylor was injured. Traylor argues that his tort claims notice was timely because: (A) he did not learn the extent of his injury until he was hospitalized; (B) he was incapacitated due to his hospitalization; and (C) he was incapacitated due to his incarceration. We will address each argument separately.

A. Knowledge of Injury.

The Indiana Supreme Court has held that "the cause of action of a tort claim accrues . . . when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." Wehling v. Citizen's Nat'l Bank, 586 N.E.2d 840, 843 (Ind. 1992). "For a cause of action to accrue, it is not necessary that the full extent of the damage be known or even ascertainable but only that some ascertainable damage has occurred." Doe v. United Methodist Church, 673 N.E.2d 839, 842 (Ind. Ct. App. 1996), trans. denied.

Here, Traylor was injured on October 29, 2003, as a result of a physical altercation with another inmate at the Pike County Jail. Traylor was knocked unconscious and suffered a cut on his lip. Traylor argues that he did not know that he was injured on October 29, 2003. He states that he "did not know that he had sustained anything more than a punch in the mouth until sometime on or after November 1, 2003, when he suffered his first seizure, and had to be transported to the hospital [, and was diagnosed with an intracranial contusion]." Appellee's Brief at 7. Specifically, Traylor argues that

"[o]ne cannot report an injury or seek damages for an injury, when he does not know that he has sustained one." Id.

To support his argument, Traylor relies on this court's decision in Garnelis, in which the sole issue was whether the plaintiff had complied with the notice requirement of the ITCA. In Garnelis, the plaintiff had been diagnosed as being HIV positive and was informed that the diagnosis was definitive on September 27, 1991. Garnelis, 806 N.E.2d at 366. Infectious disease specialists monitored the plaintiff's clinical status, but the plaintiff was never sent for repeat testing. Id. Several years later, the plaintiff was retested in order to receive treatment in another country, and it was determined, on July 5, 1999, that the plaintiff had received an incorrect diagnosis and was not in fact HIV positive. Id. at 367.

On October 7, 1999, the plaintiff served a tort claim notice on the defendant. Id. The defendant filed a motion for summary judgment alleging that the plaintiff's tort claim notice was not timely filed. Id. The trial court granted the defendant's motion. Id. On appeal, this court reversed the trial court's entry of summary judgment for the defendant and held that September 27, 1991, the date of the erroneous diagnosis, was not the date on which the plaintiff's loss occurred. Id. at 371. Instead, this court held that the triggering date was the date on which the plaintiff's cause of action accrued. Id. "A cause of action for a personal injury claim accrues and the statute of limitation begins to run 'when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another.'" Id. (citing Wehling, 586 N.E.2d at 843).

This court determined that the plaintiff "did not know or, in the exercise of due diligence, could not have discovered the alleged negligence and resulting injury until July 5, 1999," when the plaintiff discovered that he was not HIV positive. Id. Therefore, the plaintiff's cause of action accrued on July 5, 1999, and this triggered the running of the clock for the filing of the plaintiff's tort claim notice.

Unlike in Garnelis, Traylor knew or should have known on October 29, 2003, that he had been injured. It was not necessary that Traylor know the full extent of his injuries for the cause of action to accrue and the 180-day clock to begin. Thus, Traylor's argument fails.

B. Incapacitation Due to Hospitalization.

Traylor also appears to argue that his tort claim notice was timely filed because he was incapacitated and the 180-day deadline was tolled during his incapacitation. The 180-day notice requirement is subject to a statutory exception, which provides: "If a person is incapacitated and cannot give notice as required . . . the person's claim is barred unless notice is filed within one hundred eighty (180) days after the incapacity is removed." Ind. Code § 34-13-3-9 (2004). An incapacitated person is an individual who:

> (1) cannot be located upon reasonable inquiry;
> (2) is unable:
> (A) to manage in whole or in part the individual's property;
> (B) to provide self-care; or
> (C) both;
> because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity; or
> (3) has a developmental disability (as defined in IC 12-7-2-61).

Ind. Code § 34-6-2-65 (2004); Ind. Code § 29-3-1-7.5 (2004).

Pike County argues that Traylor did not qualify under the above definition as incapacitated. In response, Traylor does not indicate where he allegedly falls within the incapacitation exception. Traylor's only argument is that he "satisfied the plain and literal meaning of this definition of 'incapacitated.'" Appellee's Brief at 9. In support of his argument that he was incapacitated, Traylor relies upon Polick. In Polick, the evidence at trial established that the plaintiff was rendered a quadriplegic as a result of an accident. 668 N.E.2d at 683. For several days after her accident, the plaintiff was "confined to the intensive care unit," "required total care and was unable to move any part of her body below her shoulders," was unable to speak or communicate except by nodding her head or blinking her eyes, and "was physically unable to provide any type of self-care." Id. at 683-684. The Indiana Supreme Court held that "at least for a period of three days, the plaintiff satisfied the plain and literal meaning of this definition of 'incapacitated' because she was 'unable . . . to provide self-care . . . because of . . . physical illness [or] infirmity.'" Id. at 683 (citing Ind. Code § 29-3-1-7.5).

Unlike in Polick, the designated evidence does not indicate that Traylor was incapacitated due to his injuries. The record indicates that, in the time period following the fight at the Pike County Jail, Traylor was able to walk, talk, write, and refuse care. When Traylor was transported to Daviess Community Hospital, he answered questions and was able to stand up and walk without assistance. He was then transported to St. Mary's Hospital, where he remained from November 1, 2003, until November 6, 2003. His discharge summary noted that his Glasgow Coma Scale ranged between 14 and 15

out of a possible 15 and never fell below 14 during his hospitalization. Traylor's Glasgow Coma Scale rating dropped from 15 to 14 only because his verbal responses indicated that he was confused. The Glasgow Coma Scale did not indicate any deficiencies in eye opening or motor responses. At the time of his discharge, he was "fully alert and oriented with complaints of headache, moving all extremities strong without any deficit." Appellant's Appendix at 55.

Merely arguing that he was hospitalized does not indicate that Traylor was incapacitated. Rather, while Traylor was clearly injured, none of the designated evidence indicates that Traylor was unable "to manage in whole or in part [his] property" or that he was unable to "provide self-care" during the hospitalization. I.C. § 29-3-1-7.5. Consequently, Traylor's argument that he was incapacitated due to his hospitalization fails. See, e.g., Indiana Dept. of Highways v. Hughes, 575 N.E.2d 676, 678-679 (Ind. Ct. App. 1991) (holding under a prior version of this statute that the plaintiff was not incompetent "simply because she had a badly broken leg and ankle, which required a two-month hospital stay," where the evidence reveals that she was mentally alert, paid her bills, signed consent forms, received visitors, discussed the accident, and contemplated legal action).

C. Incapacitation Due to Incarceration.

Finally, Traylor also argues that his tort claims notice was timely because he was incarcerated. He cites to McGill v. Ind. Dept. of Correction, 636 N.E.2d 199 (Ind. Ct. App. 1994), reh'g denied. However, this case is also distinguishable. In McGill, a prisoner was injured while mowing the prison lawn on June 3, 1992. Id. at 201. The

prisoner went to the prison law library to mail his tort claim notices on November 27, 1992, but it was closed because the librarian was out. Id. The library was closed again on November 30, 1992, the one hundred and eightieth day, but the prisoner gave his notices to a library worker who placed the notices in the mailbox. Id. The notices were postmarked December 1, 1992. Id. The trial court granted the State's summary judgment motion, holding that the prisoner's claim was time barred for noncompliance with notice requirements. Id.

On appeal, this court sua sponte raised the issue of whether the trial court erred in granting the State's motion for summary judgment because the prisoner was incapacitated by his incarceration. Id. at 202. The prisoner argued that "his efforts to mail his [tort claim] notices earlier were thwarted by the 'vagaries of prison life and missing librarians,' and argues that his ability to comply with the statute was compromised by his incarceration." Id. at 202. We held that "[f]or us to find, however, that the very fact of incarceration renders a prisoner incapacitated under section 8 of the Act would be tantamount to permitting a prisoner to delay filing a claim until one hundred eighty (180) days after incarceration has ended, however, [sic] many years later that might be." Id. at 203. This court went on to state:

> A prisoner's ability to provide notice in a timely fashion may be impaired by his incarceration, but the mere status of being incarcerated, without more, by no means renders compliance with the notice statute impossible. As noted above, a prisoner is not without resources in exercising his legal rights. We conclude, therefore, that the status of incarceration alone is insufficient to render a claimant incapacitated under the Act, but where a prisoner can demonstrate incapacity by virtue of his incarceration, a notice deadline exemption may be permitted.

Id. at 204. Here, the designated evidence does not show that Traylor's ability to provide notice in a timely fashion was impaired by his incarceration.

Because Traylor did not file his tort claim notice until April 29, 2004, one hundred and eighty-three days after his initial injuries, we find that his tort claim notice was not timely filed. Thus, the trial court erred by denying Pike County's summary judgment motion. See, e.g., McGill, 636 N.E.2d at 204.

For the foregoing reasons, we reverse the trial court's denial of Pike County's motion for summary judgment and remand to the trial court for proceedings consistent with this opinion.

Reversed and remanded.

SULLIVAN, J. and CRONE, J. concur